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No. 03-15

In The
Supreme Court of the United States

STATE OF ARIZONA,

Petitioner,

v.

DARREL PETER PANDELI,
AKA DARRELL PETER FLORIAN,

Respondent.

On Petition For A Writ Of Certiorari To The Supreme Court Of Arizona

BRIEF OF NEBRASKA, ALABAMA, COLORADO, DELAWARE, MISSOURI, MONTANA, OKLAHOMA, AND VIRGINIA AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

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QUESTIONS PRESENTED

Did *Apprendi v. New Jersey,* 530 U.S. 466 (2000), create a Sixth Amendment entitlement to jury participation in every aspect of the sentence determination process, or did it instead establish a Sixth Amendment right to a jury determination of only those facts necessary to expose a guilty defendant to enhanced punishment?

In the context of a potential capital case, did *Ring v. Arizona,* 536 U.S. 584 (2002), create a Sixth Amendment entitlement to jury participation in every aspect of the sentence determination process addressing whether a guilty murderer's sentence shall be death or a lesser punishment, or did it instead establish a Sixth Amendment right to a jury determination of only those facts which first expose a guilty murderer to the enhanced punishment of death?

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STATEMENT OF AMICI INTEREST AND SUMMARY OF ARGUMENT

a. Statement of interest

The legislatures of each of the amici states have enacted criminal statutes which include death as a potential criminal sanction. These states have enacted a variety of processes to satisfy the unique Eighth Amendment procedural requirements involved in determining whether death is, or is not, an appropriate sentence in a particular case. As a part of those procedures, these states have established a specific role for their judiciary in their sentence determination process in potential capital cases.

In reliance upon their understanding of *Apprendi v. New Jersey*, 530 U.S. 466 (2000), and *Ring v. Arizona*, 536 U.S. 584 (2002), some of these states, like Nebraska and Montana[1], elected to amend their sentencing procedures in potential capital cases but retained a significant judicial role in the sentence determination process after a guilty murderer was afforded the opportunity to have a jury find those facts which would expose that individual to the possibility of an enhanced sentence of death and render that murderer death eligible.

Other states have retained their pre-*Ring* process of dividing the role of the jury and the role of the judiciary in their capital sentencing process because their juries were already engaged in finding the facts which first exposed their guilty murderers to the possibility of a sentence of

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[1] Mont. Code Ann. section 46-1-401 (2001).

death. Still others, like Arizona, have now exercised their public policy prerogative and enacted full jury sentencing.

In Nebraska, the statutory amendment which placed the sentence determination process in the hands of our judiciary following the opportunity for a jury to determine those facts which first expose a murderer to a possible sentence of death have been found by the Nebraska Supreme Court to comply with the Sixth Amendment requirements of *Ring*. Other state courts have also upheld judicial involvement in their capital sentence determination process.

In stark contrast, other state courts have held that *Ring* creates a Sixth Amendment right to a jury determination, not only of those facts which first expose the murderer to a possible sentence of death, but also jury involvement in every step of the sentence determination process.

Yet each of the amici states have at least two things in common. Each of the amici states believe that this Court's opinions in *Apprendi* and *Ring* leave open to their respective legislatures the discretion to choose a role for their judiciary in that portion of the sentence determination process not governed by the Sixth Amendment. We believe that *Apprendi* and *Ring* teach that the Sixth Amendment mandates only that an opportunity must be afforded a criminal defendant for a jury to determine any fact which must be found in order to expose that defendant to enhanced punishment. Each of the amici states believe their current statutes satisfy that Sixth Amendment requirement.

Each of the amici states believe they are not only obligated to satisfy the Sixth Amendment rights of those

who have murdered since *Ring*, but they are also obligated to comprehend and apply the Sixth Amendment rule announced in *Ring* to pre-*Ring* sentences of death which had not become final prior to the release of *Ring*. The ability to fulfill those obligations confidently and accurately is complicated by the conflicting interpretations of *Ring* announced by the highest courts of several states. The existence of those conflicting opinions makes consideration by this Court of the questions presented essential to the uniform application of the Sixth Amendment among the amici states and throughout this country.

b. Summary of argument

Apprendi and *Ring* recognized a Sixth Amendment right to a jury determination of any fact which exposes a criminal defendant to "enhanced punishment". Those state courts which have concluded that the Sixth Amendment now requires that a jury be employed at every step of the sentence determination process have inappropriately attempted to expand the Sixth Amendment holdings of *Apprendi* and *Ring*.

This Court has recognized two distinct steps in the penalty phase process of a potential capital case: (1) the determination whether the murderer is "death eligible"; and (2) the determination of an "individualized sentence". It is only at the death eligibility step of the penalty phase process that the Sixth Amendment is implicated, according to *Ring*, because it is only at that step that the murderer becomes exposed to the risk of the enhanced punishment of death. The remaining step, the "individualized sentence" process, may appropriately be conducted by members of the judiciary, a jury, or any combination thereof a

state elects to employ because those steps do not expose the murderer to enhanced punishment. State courts are not free to significantly modify our understanding of the term "death eligible", as employed in this Court's capital jurisprudence, to expand the application of the Sixth Amendment to additional aspects of a state's sentence determination process.

REASONS FOR GRANTING THE WRIT

I. State courts of last resort have decided an important federal question in a way that conflicts with the decision of other state courts of last resort.

The highest courts of five states have held that *Apprendi/Ring* require a jury to find only those facts necessary to first expose a guilty murderer to the risk of the enhanced punishment of death in a potential capital case.

The courts of three other states have now held *Apprendi/Ring* require jury participation in every step of the sentence determination process in a potential capital case.

A. States which specifically limit *Apprendi/Ring* to the punishment enhancement/death eligibility determination.

Nebraska

In *State v. Gales*, 265 Neb. 598, 658 N.W.2d 604 (2003), the Nebraska Supreme Court applied *Ring* to its newly

enacted first degree murder sentencing process in which a jury determines the existence of aggravating factors only[2] and concluded death eligibility was the determining factor under *Ring*.

> [A] person convicted of first degree murder in Nebraska is not "eligible" for the death penalty unless the State proved one or more of the statutory aggravating circumstances beyond a reasonable doubt.

Id., 658 N.W.2d at 624.

> [W]e interpret *Ring* as affecting only the narrow issue of whether there is a Sixth Amendment right to have a jury determine the existence of any aggravating circumstance upon which a capital sentence is based.

Id., 658 N.W.2d at 623. The Nebraska court specifically rejected the argument that *Ring* required that the death sentence itself must be imposed by a jury. *Id.*, 658 N.W.2d at 624. "[W]e do not read either *Apprendi* or *Ring* to require that the determination of mitigating circumstances, the balancing function, or proportionality review be undertaken by a jury." *Id.*, 658 N.W.2d at 627.

Delaware

In *Brice v. State*, 815 A.2d 314 (Del. 2003), the Delaware Supreme Court rejected arguments that *Ring* required jury

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[2] 2002 Neb. Laws, L.B. 1, 97th Legislature, 3d Special Session, enacted to "satisfy the new Sixth Amendment requirements articulated in *Ring*."

findings with respect to all aggravating circumstances considered in the ultimate sentencing decision. "*Ring* does not . . . require that the jury find every fact relied upon by the sentencing judge in the imposition of the sentence." *Id.*, at 322.

Alabama

In *Ex Parte Waldrop*, ___ So.2d ___, 2002 WL31630710 (Ala. 2002), *cert. pet. pending*, the Alabama Supreme Court rejected the argument that the weighing function of their sentencing process (balancing aggravation found against mitigation) must be conducted by the jury.

> [T]he determination whether the aggravating circumstances outweigh the mitigating circumstances is not a finding of fact or an element of the offense. Consequently, *Ring* and *Apprendi* do not require that a jury weigh the aggravating circumstances and the mitigating circumstances.

Id., at 7.

> *Ring* and *Apprendi* do not require that the jury make *every* factual determination; instead, those cases require the jury to find beyond a reasonable doubt only those facts that result in "an increase in a defendant's authorized punishment . . ."

Id., at 7.

> The jury . . . found the existence of that one aggravating circumstance: . . . At that point, Waldrop became "exposed" to, or eligible for, the death penalty.

Id., at 7.

The *Apprendi/Ring* reasoning of *Waldrop* was subsequently followed in *Ex Parte Hodges*, ___ So.2d ___, 2003 WL1145451 (Ala. 2003), *cert. pet. pending*.

Oklahoma

In *Torres v. State*, 58 P.3d 214 (Okla.Crim.App. 2002), *cert. den.*, ___ U.S. ___, 123 S.Ct. 1580, 155 L.Ed.2d 323 (2003), the Oklahoma Court of Criminal Appeals rejected the argument that *Apprendi/Ring* required a sentencing jury to find mitigation or to weigh aggravation and mitigation.

> *Ring* describes a substantive element of a capital offense as one which makes an increase in authorized punishment contingent on a finding of fact. Using this description, the substantive element of capital murder in Oklahoma is the jury's finding of the aggravating circumstance necessary to support a capital sentence. It is that finding, not the weighing of aggravating and mitigating circumstances, that authorizes jurors to consider imposing a sentence of death. That is, the increase in punishment from life imprisonment without parole to the death penalty is contingent on the factual finding of an aggravating circumstance.

Id., at 216.

> Oklahoma's provision that jurors make the factual finding of an aggravating circumstance beyond a reasonable doubt is all that *Ring* requires. Once that finding is made, the substantive elements of the capital crime are satisfied.

Id.

Indiana

In *Wrinkles v. State*, 776 N.E.2d 905, 907 (Ind. 2002), the Indiana Supreme Court also concluded a record which reflects that a jury found beyond a reasonable doubt the existence of an aggravating circumstance satisfied the Sixth Amendment requirements of *Ring*.

> The aggravating circumstance that made petitioner eligible for a death sentence was that he had committed multiple murders. *See* I.C. §§ 35-50-2-9(b)(8). The jury's verdict in the guilt phase, finding petitioner guilty of the three murders, necessarily means that the jury found, beyond a reasonable doubt, that petitioner had committed more than one murder. In addition, the jury was instructed that before it could recommend that a death sentence be imposed, the jury must find the existence of the charged aggravating circumstance beyond a reasonable doubt and that the aggravating circumstance outweighed the mitigating circumstances. Therefore, the jury necessarily determined the fact of the multiple-murder aggravating circumstance beyond a reasonable doubt.

Id., 776 N.E.2d at 907-908.

B. Conflicting interpretations: States concluding *Apprendi/Ring* applies to the entire sentence determination process.

In stark contrast to the cases noted above, the following state courts have concluded that *Apprendi/Ring*

require jury participation in every step of the sentence determination process.[3]

Arizona

The opinion this court is being ask to review, *State v. Pandeli*, 204 Ariz. 569, 65 P.3d 950 (2003), concluded that even though facts sufficient to render the defendant death eligible under Arizona law were clearly present on this record,[4] the case must be reversed for a new sentencing proceeding because that court felt *Ring* implicated not only the fact finding which first exposed the murderer to an enhanced punishment of death, but also the consideration of (1) evidence regarding the existence of mitigation and (2) the weighing of aggravation against mitigation which results in the determination of the sentence imposed.[5]

Nevada

In *Johnson v. State*, 59 P.3d 450 (Nev. 2002), the Nevada Supreme Court considered the extent to which *Ring* impacted Nevada's capital sentencing process, and

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[3] We note that each of these three states have, in response to *Ring*, enacted capital sentencing procedures in which juries now make all relevant sentencing decisions. We do not know if that legitimate public policy choice by their respective legislatures with respect to *future* capital cases influenced the Sixth Amendment analysis in these cases pending when *Ring* was announced. However, if that consideration did influence these outcomes it did so inappropriately and should not form a basis for our understanding of our federal constitution. See further discussion in Section II.

[4] *Pandeli*, 65 P.3d at 952.

[5] *Pandeli*, 65 P.3d at 953.

concluded *Ring* requires jury findings with respect to mitigation in addition to those facts which first expose a guilty murderer to the possibility of a sentence of death. "[E]ven though *Ring* expressly abstained from ruling on an 'Sixth Amendment claim with respect to mitigating circumstances,' we conclude that *Ring* requires a jury to make this finding as well:" *Johnson*, at 460.[6]

Colorado

In *Woldt v. People*, 64 P.3d 256 (Colo. 2003), the Colorado Supreme Court took a similar expansive, and state law based view of the Sixth Amendment's application to its capital sentencing process. The Colorado court concluded that their judge-based sentencing process violated *Ring*, not only with respect to the factual determination of aggravating circumstances, but also with respect to the consideration of mitigation evidence, and the weighing of aggravation and mitigation. That court reached its Sixth Amendment conclusion not by employing the exposure to enhanced penalty concept of *Apprendi*, but by placing a state law interpretation upon the term "death eligibility"[7]

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[6] The Nevada Supreme Court achieved this result, in great part, by expanding their use of the term "death eligible" far beyond the established meaning of that term in capital litigation parlance. See, further discussion of this point in Section II.

[7] *Woldt v. People*, 64 P.3d at 265.

II. A state court has decided an important question of federal law in a way that conflicts with relevant decisions of this Court.

As early as *Wiley v. Mississippi*, 479 U.S. 906, 107 S.Ct. 304, 305 (1986), the Court has used the term "death eligible" to describe the first, narrowing step of a capital sentencing process which would satisfy the Eighth Amendment. The term "death eligible" has never been employed by the Court to describe the entire sentence determination process in a potential capital case. In *Tuilaepa v. California*, 512 U.S. 967 (1994), this Court clearly articulated the terms of art by which these questions have been discussed for nearly two decades. *Tuilaepa* recognized two distinct steps in the penalty phase process of a potential capital case: (1) the determination whether the murderer is "death eligible"; and (2) the creation of an "individualized sentence".

In *State v. Ring*, 200 Ariz. 267, 25 P.3d 1139 (2001) (*State v. Ring I*), the Arizona court employed *Tuilaepa* concepts and *Apprendi* terms to address the Sixth Amendment claim before them, and concluded Ring became exposed to the enhanced punishment of death upon the finding of a single aggravating circumstance.[8]

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[8] "A defendant convicted of first-degree murder in Arizona cannot receive a death sentence unless a judge makes the factual determination that a statutory aggravating factor exists. Without that critical finding, the maximum sentence to which the defendant is exposed is life imprisonment, and not the death penalty. . . . [A] death sentence may not legally be imposed by the trial judge unless at least one aggravating factor is found to exist beyond a reasonable doubt." *State v. Ring I*, 200 Ariz. 267, 279, 25 P.3d 1139, 1151 (2001).

In *Ring*, this Court reviewed the sentencing process described in *State v. Ring I*, applied *Apprendi* to capital sentencing proceedings in which a finding of a single aggravator rendered a murderer death eligible, and concluded the Sixth Amendment was violated where a murderer did not have the opportunity for a jury to find the existence of that aggravating circumstance which first exposed the murderer to the risk of an enhanced penalty of death.

As this Court recognized in *Ring* with respect to the debate between what is appropriately termed an element of an offense as opposed to a sentencing factor, it is not by what name a function is called, but what that function accomplishes in the sentencing process, which is constitutionally relevant.[9]

Now three state courts have attempted, by an expansive misinterpretation of the term "death eligible" to expand the application of the Sixth Amendment well beyond the holdings and rationale of *Apprendi* and *Ring*.

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[9] "If Arizona prevailed on its opening argument, *Apprendi* would be reduced to a 'meaningless and formalistic' rule of statutory drafting. See *ibid.* Arizona's argument based on the *Walton* distinction between an offense's elements and sentencing factors is rendered untenable by *Apprendi*'s repeated instruction that the characterization of a fact or circumstance as an element or a sentencing factor is not determinative of the question 'who decides,' judge or jury." *Ring v. Arizona*, 536 U.S. at 586-587.

Arizona

Pandeli appears to be part of a pattern of the Arizona Supreme Court's ever expanding application of the Sixth Amendment.

In *State v. Ring I* that court held that it was the finding of a *single* aggravating circumstance which first exposed the murderer to a possible sentence of death and thus rendered that murderer death eligible.[10] In *Ring*, this Court held it was the fact finding which first exposed the guilty murderer to the risk of death as a punishment (death eligible) which had Sixth Amendment implications.

Yet in *State v. Ring II*[11] that court expanded its concept of death eligibility to include both findings with respect to *all* aggravating circumstances,[12] and all other steps of the sentence determination process.

> Neither a judge, under the superseded statutes, nor the jury, under the new statutes, can impose the death penalty unless that entity concludes that the mitigating factors are not sufficiently substantial to call for leniency.

Id., 65 P.3d at 943.

Pandeli completes that odyssey by treating judicial post-death eligibility findings with respect to mitigation and judicial weighing of aggravation and mitigation as *Ring* error.

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[10] *State v. Ring*, 200 Ariz. 267, 25 P.3d 1139 (2001).

[11] *State v. Ring*, 204 Ariz. 534, 65 P.3d 915 (2003).

[12] *State v. Ring*, 65 P.3d at 943.

Mitigation evidence does not expose a murderer to a risk of enhanced punishment. It argues for a lesser punishment.

The weighing of aggravation and mitigation evidence does not expose a murderer to enhanced punishment. If the murderer had not *already* been exposed to the risk of an enhanced punishment of death, there would be no need to move on to the mitigation and weighing steps of the sentence determination process.

Nevada

In *Johnson*, the Nevada Supreme Court appears to believe it can define, as a matter of state law, when a murderer becomes "death eligible", and that the Sixth Amendment protections attributed by *Ring* to a risk of enhanced punishment or death eligibility must automatically follow their definition utterly without limitation.

We believe that there do exist limitations upon the Sixth Amendment's application to sentencing proceedings – capital or non-capital – and that state courts are not free to manipulate the Sixth Amendment's application simply by playing with the parlance adopted and employed the Court from *Wiley v. Mississippi* through *Tuilaepa v. California* to describe the capital sentencing process.

We suggest that the answer to this potential confusion is found in the "exposure to enhanced punishment" concept described in *Apprendi*. While the consideration of mitigation evidence and the weighing of aggravation against mitigation are *required* steps in the ultimate determination of an appropriate sentence in many death penalty states, they are clearly not the steps of the sentencing

analysis which first "exposes" the murderer to the possibility of an "enhanced" punishment of death. The pivotal point in the process, in *Apprendi* terms, is the factual finding that an aggravating circumstance has been proven.

Mitigation evidence does not expose the murderer to enhanced punishment. The weighing of aggravation against mitigation does not expose the murderer to enhanced punishment. As *Apprendi* teaches, the Sixth Amendment is only implicated by a step of a sentencing process that exposes the guilty criminal to a risk of enhanced punishment. If that is correct, then the Sixth Amendment has no constitutionally required role in any other step of a criminal sentencing process which does not expose a criminal to a risk of enhanced punishment.

Thus, state legislatures are free to, as a matter of public policy, still choose to create a post-death eligibility role for the judiciary in their capital sentencing process without violating the Sixth Amendment.

III. The implications of expanding *Ring*-based holdings to a non-capital context.

Although in *Ring* this Court was concerned with the proper application of the non-capital holding in *Apprendi* to a capital sentencing process, one must also be concerned about how the interpretation of *Ring* may be applied back to non-capital cases.

While the Eighth Amendment has been held to mandate wholly unique sentencing procedures, applicable nowhere in our jurisprudence except in potential capital cases, the Sixth Amendment knows no such boundaries.

Apprendi was not a capital case yet, in the end, it dictated the result in *Ring*.

Likewise, the application of the Sixth Amendment to the entire sentence determination process in potential capital cases by the Arizona, Nevada and Colorado Supreme Courts, cannot be logically quarantined within a capital sentencing context.

If the Sixth Amendment requires jury participation in every aspect of the sentence determination process in potential capital cases, there is no reason to believe it requires less in non-capital cases.

The legal, pragmatic and economic implications of that proposition were not addressed in *Apprendi* or *Ring*. We believe those considerations were not discussed in *Apprendi* or *Ring* because it was never the intention of this Court to so expand the application of the Sixth Amendment.

CONCLUSION

Apprendi recognized a Sixth Amendment right to a jury determination of any fact which exposes a criminal defendant to "enhanced punishment". Those state courts which have now concluded that the Sixth Amendment requires that a jury be employed at every step of the sentence determination process inappropriately expand the Sixth Amendment holdings of *Apprendi* and *Ring*.

The conflict between the highest courts of these states should be resolved and we urge this Court to grant a writ of certiorari in this case to resolve that conflict.

Respectfully submitted,

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